ration. At a luncheon he asked Max Ulrich, Con Ed's vice president for public relations, about the company's "relationships" with the Water Department. After saying they were "reasonable," Ulrich indicated two major projects in the offing that would require Water Department approval—the "high line" and a pump storage hydroelectric facility at Storm King Mountain near the Catskill Aqueduct. Lipkins said he had heard the company's relations with the Department were very bad and that, through his friends "who were close to the Department," these relations would be improved if Con Ed would award some 5% to 10% of its business to the Orlando Construction Company, headed by Edward Orlando. Lipkins gave Itkin a somewhat rosy version of his success at the conference. Itkin relayed the good news to Marcus and Corallo, who suggested that if the prospective Storm King construction contracts, estimated at $100,000,000, were awarded to certain construction concerns, the three might share 40-50% of the profits. There is no contention that DeSapio played any role in these preliminaries.

Late in June or early in July, Fried, who had learned of the démarche with Con Ed and was distressed at the prospect of being excluded from the business, asked Marcus to meet him, and Marcus requested Itkin to come along. After some small talk, in the course of which Marcus told Fried to speak to Itkin as if to himself and Fried invited Marcus and Itkin to the forthcoming opening of his multimillion dollar horsefarm in Germantown, N. Y., Marcus left. Fried then asked Itkin why he and Marcus were "fooling around" with little companies like Orlando, boasted of his ability to raise $250,000 for pay-offs on 24 hours notice, and claimed to have the chairman of the New York County Republican party, and DeSapio, past chairman of

the New York County Democratic party, on his payroll. Itkin did not immediately take up the lead; instead Lipkins pursued Ulrich, without success.

Early in August, Edward Orlando, who had decided to accept Fried as a "partner" on Con Ed contracts, met with him and Itkin. According to Itkin, Fried again deprecated the Lipkins-Ulrich gambit and said, "[i]f you want to deal, come up to my farm, and I will introduce you to Carmine DeSapio and then you will be really working it right." Fried recommended a route through New Jersey and accommodations in a nearby hotel. At a meeting in Itkin's apartment on August 15, Corallo expressed to Marcus and Itkin his dissatisfaction with Lipkins' lack of progress.

The opening of the horsefarm on August 20 was attended by approximately a thousand guests. Itkin, who had used the recommended route and hotel, arrived between 1 P.M. and 2 P.M. According to him, while he was sitting with Orlando early in the afternoon, Fried came up to his table and led him off to be introduced to DeSapio. Fried said he had spoken to each man separately and, if they could work together, he would do his end. DeSapio allegedly said Itkin had been handling himself poorly and offered to help if Itkin would agree to work with no one else. Itkin accepted and was sure that Marcus would also; DeSapio gave Itkin his unlisted office telephone number. In his testimony DeSapio admitted that he knew Fried well and attended the opening in the company of Frank G. Rosetti, leader of the New York County Democratic party, and their wives. He claimed that Itkin came up alone, introduced himself as a friend of Marcus, and asked what DeSapio thought of Mayor Lindsay's administration. On two later occasions during the afternoon Itkin gave the DeSapio-Rosetti party lifts to and from the clubhouse.

DeSapio did not see Fried except at the clubhouse toward the end of the day.[2]

Soon thereafter Itkin told Marcus that DeSapio had called and would "handle" the Con Ed negotiations. Later in the month Itkin asked Marcus if he knew about the high line; Marcus inquired of his engineers and learned about it for the first time.

Itkin claimed to have met DeSapio on September 6 at the coffee shop in the Biltmore Hotel. DeSapio reiterated his poor opinion of Itkin's and Marcus' tactics and warned Itkin to stay in constant touch with him since he had been getting "insurance contracts" with Con Ed for years.[3] He said the Storm King project was too big for a starter and that the conspirators should use the high line to teach Con Ed the necessity of dealing through them. DeSapio denied this meeting.

On the same day Con Ed's vice president and chief engineer, Duncan, called upon Marcus with respect to the delay since May 9 in approving the high line project. Reviewing Con Ed's request, Marcus indicated there was no problem so far as he was concerned, although he would need added technical data, and instructed Groopman, the Department's chief engineer, to prepare a letter to that effect. Itkin testified that, on his relaying this news, DeSapio was indignant since "[i]t is much too early for me to make a move to impress upon them [Con Ed] they have to come to me" and instructed that the letter be held

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2 Rosetti corroborated most of DeSapio's account but had not witnessed the initial encounter with Itkin.

3 The Government contends that the quoted phrase was a code used by DeSapio to describe illegal projects. Although DeSapio had been employed for 10 years by an insurance broker, J. B. Rappaport and Co., this agency, according to DeSapio's testimony, had written no insurance for Con Ed.

up. On learning this, Marcus took Groopman's draft letter to the office of the Corporation Counsel, hoping thereby to obtain the desired delay. Instead of pondering about the letter which, even as drafted by Groopman, was merely a consent in principle subject to approval of engineering details and a caveat that Con Ed's contract to use the right of way would have to be renegotiated with the Board of Estimate, Assistant Corporation Counsel Redlich immediately prepared an insert making clear that Con Ed was not to incur any expense in reliance upon the approval in principle until the Department notified the company that the construction would not harm the Catskill Aqueduct. Marcus decided not to send the letter but rather to hold back for a while and then refer the matter to the Director of the Bureau of Franchises for renegotiation of the fee.

A fortnight later Luce, the new chairman of the board of Con Ed, paid his first official visit to Mayor Lindsay, at Gracie Mansion, encountered Marcus there, and pressed for approval of the high line project. Marcus went back to his office and had the Groopman-Redlich draft typed but did not send it. Itkin testified that the next day he met again with DeSapio at the Biltmore dining room.[4] DeSapio objected again to Marcus' being too compliant. Itkin related the financial pressures on Marcus; DeSapio responded that Marcus should be patient and firm, and that $25,000 would be coming from the high line "for us." He also suggested that in telephoning he would refer to

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4 Itkin testified that on the preceding day he had met with Fried and Orlando, that Fried knew of the meeting with DeSapio which had been set for the following day, and advised Itkin to "do what he says," and that Fried also gave assurance that he and Orlando "are doing our side with Con Ed."

himself as "Mr. Carl" while Itkin should call himself "Mr. Herbert."[5] DeSapio denied this meeting.

Itkin emphasized to Marcus that he must hold back on the letter and would receive $10,000 when the right time came. This would be signalled by Itkin's telling Marcus to "send the letter to my niece Plumps in England."

After a telephone call from Luce pressing for the letter, Marcus referred the matter to the Bureau of Franchises, for renegotiation of the fee, the procedure Marcus had earlier contemplated, but not acted upon, in his efforts to delay sending out the letter. He prepared a letter advising Con Ed of this but Itkin told him not to send it. Itkin claimed to have met DeSapio again at the Biltmore on September 29, and said that Marcus was now willing to return telephone calls made by Ebel, Luce's predecessor as chairman of the board of Con Ed and now chairman of the executive committee. DeSapio instructed Marcus to do this at an appointed date and time, October 9 at 11 A.M.; DeSapio would notify Con Ed of this in advance through Fried. It was also agreed that Itkin and DeSapio would split the $15,000 of the anticipated $25,000 payment remaining after Marcus' $10,000. DeSapio admitted having once met Itkin near the Biltmore coffee shop in October. He said that Itkin had proposed only that they should use their contacts to get something done about housing mortgage insurance.[6]

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5 Itkin's secretary testified to frequent calls between September and December 1967, from a woman who said Mr. DeSapio or Mr. Carl was calling. DeSapio denied ever using the pseudonym "Mr. Carl."

6 DeSapio and his secretary accounted for Itkin's finding him at the Biltmore coffee shop on the basis that Itkin had called his unlisted number and the secretary had indicated that he would be there. On the other hand, when interviewed by the New York County District Attorney's office, DeSapio made a statement which, as we read it, said

Marcus telephoned Ebel as arranged and saw him the next day. According to a report by Itkin to Marcus and Corallo at a meeting on October 11 which Itkin recorded, Ebel had emerged with the belief that the permit would soon issue; Itkin urged that Marcus disabuse him of this by professing outrage at a Con Ed advertisement disclosing that the high line would provide a nine-fold increase in power capacity, a circumstance which, more than ever, would entail a larger fee for the City. Marcus and Itkin testified that Itkin told Corallo at this meeting that De Sapio was to be the new intermediary with Con Ed. Defense counsel argues that the tape recording does not bear this out, and that the references to DeSapio concerned proposed "public relations" contracts with Brooklyn Union Gas Co., alleged by Itkin to have been discussed at the September 29 meeting with DeSapio. Although the tape is subject to more than one interpretation, the references to DeSapio's role with Con Ed are surely not so clear as Itkin's and Marcus' testimony about them.

Itkin testified he then told DeSapio that Marcus would again call Ebel, and DeSapio insisted on knowing the exact day and time. A telephone call from Itkin in New York to Marcus at his house at Beach Haven, N. J., fixed this, and Itkin relayed the information to DeSapio. DeSapio denied all of this.

We turn now to testimony by Con Ed's former vice president in charge of construction, Gerald Hadden, who testified under a grant of immunity. He had lunched on November 3 with Fried, from whom he had received cash gratuities since he had succeeded to the responsibility of

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he had called his secretary to find his messages and instructed her to inform three or four people, including Itkin, that he would be in the Biltmore cocktail lounge.

preparing the list of contractors permitted to bid on Con Ed construction jobs. Fried told of having heard that Con Ed was having difficulty with the City about the high line, which Hadden confirmed, and thought he could be of some help.

Max Ulrich testified that a week later Sidney Baron, head of a public relations firm with a consulting contract with Con Ed and a long-time friend of DeSapio, invited Ulrich to lunch and asked him to break an engagement to that end.[7] DeSapio was with Baron, who professed knowledge of Con Ed's problems, expressed doubt that Lipkins could assist, but thought DeSapio might be of help in view of his "knowledge and experience in governmental affairs." DeSapio expressed concern that the relations between two such vital organizations as the Department of Water Supply and Con Ed "were not particularly good" and thought he might be able "to act, perhaps, as some sort of a referee . . ." DeSapio admitted that he was present at the lunch and that Con Ed's problems with the Water Department were discussed, but denied that he had offered to assist.

We now return to Hadden. At another lunch, on November 17, Fried said he might have some friends who could help with the high line problem. Three days later DeSapio joined Hadden and Fried at lunch, asked Hadden to explain the permit problem, and said that maybe he could help. DeSapio's version was that he had come into the restaurant, which was across the street from his office, to look for his employer; that he had greeted Fried who introduced him to Hadden; but that there was no conversation.

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7 The other party to the engagement confirmed that this had been done.

Itkin testified that on the same day he spoke to DeSapio on the phone, and DeSapio said, "You can send that insurance policy out," see fn. 3. On November 21 Itkin gave Marcus the prearranged signal, but Marcus did not immediately respond. Hadden testified that on November 22 DeSapio again lunched with him and Fried, asked what Con Ed needed, and inquired whether a letter would do. In his testimony DeSapio insisted there had been only one encounter with Fried and Hadden, which was of the innocent sort described above.

According to Itkin, DeSapio telephoned him later that day in anger because no letter had been delivered. Itkin called Marcus, who had the non-committal letter taken to Luce late that afternoon. Itkin then went to DeSapio's office for the promised payment. DeSapio complained that the letter had been delivered to the wrong person. He called Fried, who advised holding Itkin and Marcus off. DeSapio demurred and told Itkin to come to his apartment two days later[8] when "I will have some of the money even if I have to lay it out in advance until I get it back from . . . Fried." DeSapio denied that any such conversation had occurred.

Itkin claimed that he went to DeSapio's apartment as arranged. DeSapio said he had heard the letter was "weak" but was advancing $5,000. Itkin assured him that Marcus would cure any deficiencies. Hadden testified that on the same day, November 24, Fried telephoned him and indicated that the letter had been despatched. When Fried called again on November 27, Hadden said the letter was worthless and sent Fried a copy.

Itkin asserted that on November 29 DeSapio gave him an additional $2,500 but would advance no more until Fried

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8 The intervening day was Thanksgiving.

reimbursed him. However, on December 4 he paid another $5,000.[9] DeSapio said that Fried had paid him only partially, that Fried had decided to pay only $20,000 since the letter was so weak, but that he would not reduce his $7,500 share. When Itkin protested, DeSapio said "it is only the beginning with us." DeSapio denied all of this, as well as the meeting described in the preceding paragraph.

Hadden recounted a third lunch with DeSapio and Fried on December 5. He repeated that the letter was worthless. DeSapio said "these people" were "hungry for money." Hadden thought nothing should be paid since the letter was not a permit, but Fried insisted he would still pay $20,000. DeSapio denied being present at any such meeting.

On December 12 Marcus resigned as Commissioner. Hadden invited Fried to lunch the next day and expressed concern. Fried told him not to worry although Fried said he had paid the $20,000, and gave Hadden $5,000 as a "Christmas present." Fried, Marcus, Itkin and Corallo were indicted on December 18 by a federal grand jury with respect to the Bronx reservoir contract.

It remains only to recount a final episode. On Friday, January 5, 1968, W. Donham Crawford, Con Ed's vice president for purchasing, summoned Fried to his office. Fried was informed he had been dropped from the list of contractors authorized to bid for Con Ed projects. After unsuccessful protests that such action was unjustified because he should be presumed innocent of the charges against him, Fried "out of the clear blue sky" declared "Well, you know $20,000 has been provided to Mr. Marcus and that

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9 This included two $2,000 packets of cash in wrappers of the Bank of North America. There was evidence permitting a conclusion that these, which were received in evidence, and their contents had come from Fried.

there was a luncheon at which this matter was discussed and present were CD [to wit, DeSapio] and JH [to wit, Hadden]." Fried added that "this was for the transmission line in Westchester." Crawford reported this to Luce, who informed Hadden, who in turn sent for Fried. The following Monday, January 8, Fried made another visit to Con Ed's offices. He stated to Hadden, and later repeated in Crawford's presence, "You are not involved in this at all." He added that he wanted to see Luce. Hadden was called away. After telling Crawford there was going to be a full exposé of the high line affair, Fried explained that in fact Hadden was involved, and that Duncan and Ulrich knew about the matter. He added that "DeSapio has to be made whole" and "I can take care of that." He renewed his insistence on seeing Luce or some other high Con Ed official to plead for restoration to the bidding list. His request was not granted.

Although counsel for DeSapio points to many weaknesses in the Government's case, notably Marcus' inability either to aid or to obstruct the high line project once he had placed the issue in the Bureau of Franchises, the worthlessness of the letter that produced the alleged payments, and the unlikelihood that Fried would make or authorize a kick-back with no assurance that Con Ed would depart from its competitive bidding procedures, he does not and could not properly contend that the evidence was insufficient for submission to the jury. His argument rather is that the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here. We will consider the appeal on that basis.

II.

DeSapio's first point concerns the denial of his motion for a trial separate from Corallo's. There is and could be no claim that joinder was improper under F. R. Cr. P. 8(b); the contention is rather that the joint trial so prejudiced him as to render the refusal to grant a severance under F. R. Cr. P. 14 an abuse of discretion. As to this the Fifth Circuit has recently observed, *Tillman* v. *United States*, 406 F.2d 930, 935, *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969):

> The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review, 8 Moore, Federal Practice ¶14.02 [1], p. 14-3 (2d ed. 1968). The defendant must show something more than the fact that "a separate trial might offer him a better chance of acquittal." Id. at ¶14.104[1], pp. 14-14–14-15.

DeSapio's claim of prejudicial misjoinder must be appraised in light of the evidence and the positions of the parties. The proof left little doubt that Marcus, Itkin, and Fried were members of a conspiracy in which Marcus—by withholding or delaying the issuance of permits—would induce Con Ed to award construction contracts to Fried who would make payments to Marcus and Itkin in return. DeSapio did not deny the existence of such a conspiracy; he insisted that he had no part in it and that his participation had been invented by Itkin to increase Itkin's own stature with the FBI and other prosecutorial agencies. Corallo likewise did not dispute such a conspiracy; he claimed that he had not been allowed to participate or that, to such extent as he had been, this was simply a continua-

tion of the Bronx Reservoir conspiracy, in which, as the judge made crystal clear to the jury, it was plain DeSapio was not involved. There was no evidence, and no suggestion, that Corallo and DeSapio ever met or spoke to each other.

Mere statement of these facts sufficiently disposes of most of DeSapio's arguments on this score. Proof of the Bronx Reservoir conspiracy showed that Marcus, Itkin, Corallo and Fried had previously worked out kick-back agreements and thus was relevant to prove they could well have been continuing along the same line. But it had not the slightest tendency to prove DeSapio's participation in the Con Ed conspiracy, and it is no abuse of discretion to deny a severance merely because of the remote possibility that the jury might draw so irrational an inference. The same comment applies to references to other kickbacks mentioned in the recording of the October 11 meeting of Marcus, Itkin and Corallo. It is similarly unrealistic to suppose that pre-trial publicity and evidence showing Corallo to have been an underworld character could have "rubbed off" on DeSapio when there was no claim that he had ever had anything to do with Corallo. Such contentions take insufficient account of the intelligence and conscientiousness of the jury, the effective efforts of the judge to keep it on the beam, the skill of defense counsel, and the requirement under F. R. Cr. P. 14 that the defendant demonstrate substantial prejudice from a joint trial, not simply "a better chance of acquittal" at a separate one, *Tillman* v. *United States, supra;* 8 Moore, Federal Practice ¶14.04[1], pp. 14-14–14-19 (1970 ed.).

The only point deserving further comment under this heading is the claim that statements of Corallo's counsel, particularly in summation, in effect conceded the bulk of the Government's case. Although some of the passages quoted

in appellant's brief are taken out of context, we can still understand how "exasperating," to use Judge Medina's apt adjective, *United States* v. *Kelly*, 349 F.2d 720, 766 (2 Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), the gushing summation for Corallo must have been to counsel who was making a tight defense on DeSapio's behalf. But here again counsel underestimates the jury's awareness of its responsibility to appraise the credibility of the witnesses and the immateriality of what Corallo's lawyer thought about portions of the Government's case, particularly in light of the court's admonition that "the lawyers . . . have no right to make any determinations of credibility of witnesses" and that their "comments were argument only."

III.

We next consider a variety of claims having the ambiguous role of Itkin as their common theme.

In *United States* v. *Corallo, supra*, 413 F.2d at 1320-22, the court was not required to reach similar contentions since it found no sufficient contradiction to Itkin's testimony "that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid." The record in this case would not support so broad a finding. At least from mid-summer of 1967 Itkin kept the FBI informed of the conspiracy's progress.[10]

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10 For example, Itkin gave his "contact" in the FBI, Agent Vericker, advance notice of his meeting with Marcus, and Corallo on August 15 and turned over the tape recording of it. The same occurred with respect to the October 11 meeting. In the interval he had been in touch with the FBI two or three times weekly. During the critical period leading up to and embracing his receipt of payoffs from DeSapio

Itkin testified on cross-examination that it was always his intention to turn over to the FBI information on deals that had been completed, that he would have pursued the larger Storm King projects on the same basis if that had proved possible, and that his "primary motive was never to make the money." On the other hand, the FBI never told him what to do. While he was "infiltrating, . . . picking and choosing as it came," the Con Ed venture was his own activity and he "was very definitely a participant." Vericker admitted the FBI knew that Itkin "had obtained illegal money" but denied that it had directed or authorized Itkin to participate in the Con Ed scheme and defended its failure to take earlier action on the ground that Itkin "was giving us a tremendous amount of information on labor racketeers, on hoodlums, and we did have this evaluation problem."

On the basis of these facts, DeSapio asks that, in the exercise of our supervisory power, and also as a matter of due process, we reverse the conviction because, as said in Chief Justice Warren's solitary dissent in *Hoffa* v. *United States*, 385 U.S. 293, 315 (1966), "the nature of the official practices evidenced here is offensive to the fair administration of justice in federal courts." The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound, cf. *Lopez* v. *United States*, 373 U.S. 427 (1963); or of the narcotics agent who plays an equivalent role in a pusher's home, cf. *Lewis* v. *United States*, 385 U.S. 206 (1966). In

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in November 1967, Itkin made six contacts with Vericker. In addition, he turned over the two bank wrappers allegedly received from DeSapio on December 4—but not the $4,000 they contained.

such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social consequences; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use. To be weighed against this, however, is the value of the information supplied by Itkin, revealing an extensive picture of corruption in high places, both in city government and in business, which had not theretofore been detected and very likely could not have been exposed in any other way. The difficulties courts have had in explicating and marking the boundaries of the defense of entrapment,[11] see *Sorrells* v. *United States*, 287 U.S. 435 (1932), *Sherman* v. *United States*, 356 U.S. 369 (1958), and the material in Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure 421-38 (1969), suggest the inadvisability of attempting to develop a penumbral doctrine that would add to the many collateral issues now pervading criminal trials still another, a judicial determination whether the activities of an informer had passed some ill-defined acceptable bounds. Where, as here, there is no claim that the informer's activity infringed any specific of the Bill of Rights or any statute of the United States relating to the conduct of investigations, and the competing considerations are such that we are unable to conclude that it violates the "decencies of civilized conduct," *Rochin* v. *California*, 342 U.S. 165, 173 (1952), such decisions had best be left to the executive branch, which is accountable for its conduct to Congress.

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11 No claim is made on that score. The Government's case was that DeSapio was brought into the conspiracy by Fried and was a willing participant; DeSapio's case was that he never participated at all.

A second string on the Itkin bow is that if he was not a genuine member of the conspiracy, much testimony was wrongly received. DeSapio concedes, as he must, that, whether conspirator or not, Itkin could testify to anything that he knew the conspirators did or that DeSapio said in his presence. On the other hand, Marcus' testimony concerning narrations by Itkin would have had to be excluded unless Itkin was a member of the conspiracy. It is contended also that if Itkin was not a conspirator, the jurisdictional basis for the two substantive accounts would disappear since these were based on Itkin's travel through New Jersey to Fried's horsefarm and his telephoning Marcus in that state.

The evidence we have summarized warranted a conclusion that Itkin was participating in the conspiracy, even though he was currently reporting developments to the FBI and doubtless did not expect to be prosecuted. Whatever Itkin's motives may have been, and one can infer from the evidence that they were not always entirely consistent, the record clearly supports the finding that Itkin, on his own initiative, entered into an illicit agreement with Fried, Marcus, and others to carry out the high line venture. The contention that Itkin's disavowal of personal monetary benefit was inconsistent with his conspiratorial objective is sufficiently answered by our recent holding in *United States* v. *Peltz*, —— F.2d ——, —— (1970), slip opinions, 97, 102, that one can be a member of a conspiracy without seeking financial gain from the enterprise—however rare such a conspirator may be. Moreover, Itkin's having received and apparently kept some of the proceeds of the conspiracy casts doubt on his eleemosynary intentions; what he apparently meant by this testimony was that after paying for lunches and the like—his necessary "business" expenses—he had little left for himself.

The judge would thus have been justified in making an independent determination that Itkin was a conspirator and that his narrations were therefore admissible, *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Instead, after summarizing the testimony, he told the jury that if they believed Itkin and Vericker, they should deem Itkin to have been a conspirator, whereas if they did not and determined "that the FBI specifically instructed or authorized Itkin to participate in the Con Edison scheme from the very beginning, then you could determine that Itkin was not a conspirator as contemplated by the law." He also instructed that if the jury determined that Itkin, as an agent of the Government, contrived to travel to Fried's farm via New Jersey and to call Marcus in that state for the sole purpose of conferring jurisdiction on the federal courts, they should acquit on the substantive counts.

Although counsel now criticizes these instructions as too limited, he did not do so when the judge invited an expression of disagreement, but excepted only to the court's refusal to instruct that Itkin was not a conspirator as a matter of law.[12] The defense was not entitled to such an instruction.

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12 This was the position reflected in Request No. 1 to charge. Counsel's statement must be taken as waiving the more moderate alternative reflected in Request No. 2. Similarly counsel's failure to except to the instruction with respect to travel constituted an abandonment of any point with respect to the difference between the instruction as given and Request No. 3. See *Armstrong* v. *United States*, 228 F.2d 764, 768 (8 Cir.), *cert. denied*, 351 U.S. 918 (1956); *Johnson* v. *United States*, 291 F.2d 150, 156 (8 Cir.), *cert. denied*, 368 U.S. 880 (1961). Cf. *United States for the use and benefit of D'Agostino Excavators, Inc.* v. *Heyward-Robinson Co.*, —— F.2d ——; —— (2 Cir. 1970), 1969 Term slip opinions, 3985, 3997-98.

IV.

DeSapio challenges the admissibility of several damaging statements made by Fried to Hadden on December 13, 1967 and to Crawford on January 5 and 8, 1968. His contention is that upon Marcus' resignation and indictment, the conspiracy ground to an abrupt halt since the conspirators could no longer utilize Marcus' office as a means of inducing Con Ed to award construction contracts to Fried; any declarations after that time, it is argued, could not be in furtherance of the conspiracy and were therefore improperly received. We do not question that if there were error in receiving Fried's statements, this would be sufficiently serious to require reversal, since these constituted the only testimonial support for Itkin's story of payments by DeSapio. We do not think there was.

The Government say that the argument here under consideration takes too narrow a view of the conspiracy. The indictment named as one objective that, as a result of informing Con Ed of Marcus' intention to misuse the powers of his office for his own benefit and to the detriment of Con Ed, Con Ed "would enter into contracts with the defendant HENRY FRIED that companies owned, controlled and designated" by him and that such "companies would pay him money in the form of dividends, salary and commissions." The prosecution argues that while Marcus' resignation and indictment indeed prevented any further use of his position for extortion on new Con Ed applications, it did not prevent the conspirators from endeavoring to secure what all along had been the only object of interest to Fried.

If the Government's argument depended on showing that Fried entertained any belief, at least on January 5 and 8, 1968, that he could obtain the high line contract from

Con Ed without competitive bidding, we should have to reject it. Fried was far too sophisticated to believe that the new Con Ed management would expose itself to suspicion, or worse, by departing from established bidding procedures in favor of a man just indicted for having given a kickback to the former Water Commissioner. Beyond that, counsel's cross-examination of Crawford made it clear that Fried's objective on January 5 and 8 was simply to be restored to the competitive bidding list.

We see no reason, however, why so much should be required. From the time of DeSapio's alleged entrance into the conspiracy at Fried's instance, it was contemplated that the money to be paid to Marcus, Itkin and himself would come from Fried, who would find his compensation in contracts with Con Ed. After DeSapio had advanced money, it was surely an important objective for him to receive repayment as well as his own promised share, and Fried remained the only source. While Fried might have decided to provide this in any event, and indeed once said he had done so, he chose to pursue the possibility that he might maintain profitable relationships with Con Ed by remaining on the bidding list and thereby make both himself and DeSapio "whole." That he believed his relations with Hadden and DeSapio's influence still carried some weight in attaining this more limited objective is apparent from the record. Since there is no evidence that DeSapio had withdrawn from the conspiracy at this time, he must be deemed to have authorized Fried to put this forward. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946). A conspirator who has laid out money in the expectation of reimbursement from another member takes the risk that the latter may make imprudent disclosures in endeavoring to obtain the wherewithal. Such

declarations are no less in furtherance of the conspiracy because the prospects of success may now appear dim, the objectives of the conspiracy had become more limited and the hoped repetition of the conspiratorial endeavor was impossible.

We recognize, of course, that actions do not become acts in furtherance of a conspiracy *merely* because a conspirator is seeking a means of meeting the financial obligations he incurred therein, for example, if Fried had been removed from the bidding list of some other company not an objective of the conspiracy and had protested that he must be left on the list since he needed the wherewithal to make DeSapio whole. Here, by contrast, Fried was employing means contemplated by the original agreement—the use of his own and DeSapio's influence with Con Ed to achieve ends within the scope of the venture. This case is thus unlike *Krulewitch* v. *United States*, 336 U.S. 440 (1949) or *Grunewald* v. *United States*, 353 U.S. 391 (1957), which involved alleged continuing or subsidiary conspiracies "to conceal facts in order to prevent detection, conviction and punishment." 336 U.S. at 443. Rather than attempting to cover his tracks, Fried was making affirmative efforts to salvage what was left in the enterprise.

V.

DeSapio's other challenges to the conduct of the trial require much less comment. One of these concerns an interview by an Assistant District Attorney of New York County. DeSapio had been fully warned of his rights; indeed he was asked to bring a lawyer with him but declined. The complaint is that the interview was recorded and the recording gave rise to the contradiction noted in fn. 6. So long as *Lopez* v. *United States*, 373 U.S. 427, 439 (1963), remains the law, the claim is frivolous.

Counsel complains that "much of the cross-examination of DeSapio was acutely concerned with how DeSapio, in fact, makes a living and revealed the Government's preoccupation with depicting him as a back-office fixer and influence peddler having no professional training or skills to speak of except the resources of powerful friendships." If it was, this was permissible in light of DeSapio's description of himself as a legitimate employee of an insurance broker and his denial of Itkin's testimony that he had boasted of having obtained "insurance contracts," see fn. 3, from Con Ed for many years and having "almost everything boxed in in the City" along with his Republican counterpart. The only item where the prosecution would have overstepped the bounds was what, despite contrary protestations, we must regard as an attempt to put before the jury a well-publicized incident in which newspapers reported during 1957 that DeSapio had left a paper bag containing $11,000 in cash in a taxicab. However, the prompt objection of defense counsel aborted the inquiry before it could assume offensive form and the judge promptly struck out not only what there was of the question but also its predecessor, and instructed the prosecutor to start again.

While the prosecutor's summation was vigorous, it did not exceed the limits of fair argument, see *United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966), particularly in light of the emotional summation by defense counsel, and, save on several unimportant occasions, was not made the subject of objection. We have examined the materials which the trial court declined to make available to the defense under 18 U.S.C. §3500, and find no error in that ruling. Other trial errors claimed by DeSapio have been considered but do not merit discussion.

VI.

We come finally to the denial of DeSapio's motion for a new trial. Here some further facts must first be stated.

Near the end of its case, the defense called as a witness Harold Daniels, a brother-in-law of Henry Fried. Daniels testified that on August 20, the day of the opening of the horsefarm, he saw Fried at the clubhouse around 1:30 P.M.; that Fried was suffering from an attack of gout and couldn't walk; that he took Fried in his car to a parked school bus, holding forty to forty-five people, which Fried entered; that Fried asked him also to join the bus tours because Fried was physically unable to get in and out to show points of interest to the guests; that the bus made two such tours; that Fried was continuously on the bus until the completion of the second tour around 5:30 P.M., when Fried, who was carrying a cane, went to the clubhouse where the dedication ceremonies were held; and that Daniels did not see DeSapio until such ceremonies a few minutes later.

If this testimony was believed, it would have shattered Itkin's account of his meeting with Fried at the horsefarm and also of Fried's having related an earlier meeting there with DeSapio, and would have confirmed DeSapio's testimony that he did not see Fried except at the clubhouse toward the end of the day. With the taking of testimony scheduled to close on the following day, the Government was forced to act with more than deliberate speed. Using the horsefarm guest-book as its source, it obtained four witnesses whom it offered in rebuttal.

Mrs. Gordon Auchincloss testified she saw Fried near the swimming pool on the farm around 2 P.M. and again about an hour thereafter, and thought she had seen him in a tent still later. She was "not conscious" of his using a

cane. Monsignor Kane said that, after arriving at the farm around 3 P.M., he met Daniels and visited the latter's mansion nearby. Later he was introduced to Henry Fried at the race track. Ulrich testified that when he arrived at the farm about 2 P.M., Henry Fried was standing at the entrance greeting the arrivals. When Ulrich saw him in the same general location about an hour later and went over to thank him for the invitation, Fried suggested that they look at the indoor track, to which Ulrich drove him, and also at his new home, where Fried conducted a 15 minute tour. Finally Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm, testified that "Mr. Fried" had walked over to the swimming pool around 2:30 P.M., and that she did not believe he was on the bus she entered for a tour around 3 P.M. She had previously met Henry Fried, "but not personally," when he visited the Home.

The motion for a new trial was predicated on an attack upon the testimony of two of the four witnesses. At a hearing on the motion conducted by the district judge, Monsignor Flanagan, who had attended the opening along with Monsignor Kane, placed their visit to the Daniels mansion at five o'clock as opposed to Kane's version of shortly after three. More important, it turned out that Sister Ann James' testimony was founded on a serious mistake. On returning to the Home from the courthouse, she had looked for a photograph that had been taken while she was on the farm with "Mr. Fried." She found this was Richard Fried; he looked nothing like his brother Henry, who had indeed visited the Carmelite Home. She immediately communicated this to the lawyer for the order, John J. Kelly, who had accompanied her to court that morning. He did not advise the court or counsel about this

serious error until after the verdict, and then only as a result of an investigation initiated by defense counsel. At the post-trial hearing the Government bolstered its case with testimony by two new witnesses whom it had located in the interval. Richard Staats, the driver of the bus, testified that neither Henry Fried nor Daniels was on it at any time, that Henry Fried was walking about the grounds without a cane, and that Fried came up to the bus and gave him a $10 tip at the end of the day. William Foster, a guest, who also testified that Henry Fried was walking around "meeting the people and talking to the people," identified motion picture photographs he had taken between 3 and 3:30 P.M. In one Daniels appears on the grounds *sans* Henry Fried, in another Henry Fried is standing with a group *sans* Daniels.[13] On the basis of this evidence the judge denied the motion for a new trial.

If the motion is viewed simply as one based on newly discovered evidence and free from any question of prosecutorial misconduct, the denial was well within the judge's discretion. This is so whether the applicable test is the formulation of *Berry* v. *State*, 10 Ga. 511, 527 (1851), namely, whether the new evidence "is so material that it would probably produce a different verdict, if the new trial were granted" or of *Larrison* v. *United States*, 24 F. 2d 82, 87 (7 Cir. 1928), namely, whether it might have produced a different verdict. See *United States* v. *Miller*, 411 F.2d 825, 830-31 (2 Cir. 1969), and the cases there cited.[14] While the newly discovered evidence indeed can-

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13 We have viewed the pictures in the presence of counsel. While we agree with appellant that Fried is not moving, he was standing on the grounds and no cane was visible.

14 The Government points out in brief that *Larrison* dealt with a situation where a principal prosecution witness had made an affidavit (later repudiated) that he had given false testimony *at the instance of Post*

celled out the evidence of Sister Ann James, it left the testimony of Mrs. Auchincloss and Ulrich unimpaired and simply created a contradiction with respect to Monsignor Kane's. However the matter might stand if that were all, the testimony of Staats and Foster and the motion picture film constituted such a devastating contradiction of Daniels' testimony that, as the Government suggests, it seems exceedingly doubtful that skilled counsel would even use that in a new trial.[15] Beyond all this, it defies belief that, with a thousand people in attendance at the horsefarm, whose names were available, the defense could find no one but Henry Fried's brother-in-law to testify that Fried was afflicted with gout, was consequently unable to greet his guests, and had to spend most of the afternoon in a bus—if such were the facts.

Appellant contends we should apply the less severe test of probable effect which we follow in instances of prosecutorial misconduct. *United States* v. *Keogh*, 391 F.2d 138, 146-47 (1968); *United States* v. *Miller*, *supra*, 411 F.2d at 830-32; *United States* v. *Polisi*, 416 F.2d 573, 577-79 (1969). The items of alleged misconduct are:

(1) That, before testifying, Sister Ann James had been shown a group of four or five photographs including one of Henry Fried on which his name had appeared whereas the others bore no names;[16]

Office inspectors. This would account for the departure from the *Berry* test, which the opinion did not mention. In fact the *Larrison* court denied a new trial. We are inclined to agree that the less severe *Larrison* test should be confined to cases of prosecutorial misconduct.

15 Apparently Daniels has died but his testimony at the instant trial would, of course, be usable if the defense wished.

16 Something is also sought to be made of the fact that one photograph was of a woman. While this was a stupid mistake, it obviously was not directed to leading Sister Ann James to make a misidentification of Henry Fried.

(2) That the prosecution did not reveal to defense counsel that the photographs had been exhibited;

(3) That the prosecutor allegedly concealed that Sister Theresa,[17] who had accompanied Sister Ann James both to the horsefarm and to the courthouse, had been unable to identify the photograph of Henry Fried;

(4) That, as the defense would also have proved through Sister Theresa, Sister Ann James had expressed doubt to the prosecutor about her identification of the photograph which the prosecutor did not reveal; and

(5) That the prosecutor deliberately couched his questions to Sister Ann James in terms of "Mr. Fried," knowing that she was thinking of Richard rather than Henry.

We can speedily dispose of (2). While it might have been better practice for the prosecution to have put the defense on notice of the photographic identification, compare *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 913 & n. 1 (2 Cir. 1970), experienced counsel must surely have been aware of this possibility, and there is no reason to doubt that the court would have allowed a *voir dire* on this subject if request had been made. We can also quickly dispose of (5), on quite different grounds. If the prosecutor had deliberately indulged in any such tactic as the defense claims, this would warrant the most stringent condemnation and appropriate corrective action. But we see no evidence that he did. Sister Ann James had identified

17 The court did not allow the defense to call Sister Theresa at the post-trial hearing.

Henry Fried's photograph and, so far as the record shows, had said nothing about Richard. The criticism of the prosecutor thus depends on reading into his conduct at the trial knowledge he obtained only later.

The prosecution explains item (1) on the basis that its only available photograph of Henry Fried bore his name, that it endeavored to conceal this from Sister Ann James by arranging the photographs so that the name would be covered, but that there was an unintended slip-up. We find no misconduct in the showing of the photographs; with time running against it, the prosecution had to make do with what it had. It is a closer question whether the slip-up created a duty of disclosure that the mere showing of photographs would not. Here again it is necessary to avoid viewing the prosecutor's actions on the basis of hindsight and to make some allowance for the haste with which he was forced to act.

This leaves only items (3) and (4). Since in our view the court should have allowed Sister Theresa to testify, we will assume *arguendo* that she would have given evidence in accordance with counsel's offer of proof. This was not that Sister Theresa would assert that she had not seen the man whose photograph had been exhibited, but only "that she could not identify any of the pictures because of the length of time," over two years. While the defense might have liked to know this, we do not believe it was so significant that non-disclosure was a breach of the prosecutor's obligation, especially since the defense could easily have learned of Sister Theresa by asking Sister Ann James whether she was accompanied as Sisters usually are. This leaves only item (4). Viewing the matter with the benefit of hindsight, and assuming that the facts were as stated in the offer of proof, we are bound to say

it would have been better if the Assistant District Attorney had revealed Sister Ann James' uncertainty before or during her examination. Still this case is a long way not only from "a considered decision to suppress, taken for the very purpose of obstructing," and even from "a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention," *United States* v. *Keogh, supra,* 391 F.2d at 146-47. Sister Ann James was one of four witnesses called to contradict Daniels' story, even though very likely the most impressive. Revelation that she had not been absolutely sure of her identification of the photograph, although she was reasonably sure that the man she saw at the horsefarm was Henry Fried, who had admittedly visited the Home, would hardly have been of "high value to the defense." Here, as in the case of the interrogation about "Mr. Fried," the defense embroiders later developments into a sinister cloak over prosecutorial omissions "where hindsight discloses that the defense could have put the evidence to not insignificant use," *United States* v. *Keogh, supra,* 391 F.2d at 147. As already noted, the prosecutor's conduct must also be considered in light of the defense stratagem of calling Daniels as one of its last witnesses and the consequent need for preparation of rebuttal testimony after the trial recessed that afternoon and before it began the next morning. Prosecutors under such stress cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made. We thus do not find this to be a case where the defense is entitled to the benefit of "a fairly low showing of materiality," 391 F.2d at 148, of the newly discovered evidence.

On careful review of the entire record we are satisfied that Carmine DeSapio was accorded a fair trial conforming to law, and that the judge was warranted in refusing to direct a new one. The verdict must therefore stand.

Affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 492—September Term, 1971.
(Argued January 19, 1971 Decided February 25, 1972.)

Docket No. 71-2153

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE G. DE SAPIO,

Defendant-Appellant.

Before:

SMITH, FEINBERG and MULLIGAN,

Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge,* denying appellant's second motion for a new trial based upon newly discovered evidence and alleged government suppression of evidence at trial or alternatively for an evidentiary hearing.

Affirmed.

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ROBERT G. MORVILLO, Assistant United States Attorney, New York, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, James Schreiber, Ross Sandler, Peter F. Rient, Asst. United States Attorneys, of counsel), *for Appellee.*

MILTON S. GOULD, New York, New York (Shea Gould Climenko & Kramer, New York, N. Y., Henry J. Boitel, Miles F. McDonald, Bernard D. Fischman, of counsel), *for Defendant-Appellant.*

PAUL G. CHEVIGNY, New York, New York, Attorney, New York Civil Liberties Union, *Amicus Curiae.*

MULLIGAN, *Circuit Judge*:

Carmine G. De Sapio appeals from an order entered in the United States District Court for the Southern District of New York on December 13, 1971 by the Hon. Harold R. Tyler, United States District Judge, denying his second motion for a new trial based upon newly discovered evidence (Fed. R. Crim. P. 33) and the alleged suppression of evidence by the United States Government at trial or alternatively for an evidentiary hearing.

After a four-and-a-half week trial before Judge Tyler, the jury returned a guilty verdict against De Sapio on December 13, 1969. He was convicted of conspiracy to obstruct commerce through extortion and to travel interstate and to use interstate facilities to commit bribery (18 U.S.C. § 371) and of two substantive violations of 18 U.S.C. § 1952, unlawfully travelling interstate and using interstate telephone facilities to facilitate bribery. The jury found

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the motion for a new trial and the suggested alternative of an evidentiary hearing.

Much of that which is alleged to be new was unquestionably known or should have been known to De Sapio's counsel at the time of the trial; that which wasn't is merely impeaching or cumulative, and the proposition that it probably or even possibly might change the jury verdict is not tenable. The so-called new evidence sheds no further light on Itkin's relationship to the government which has already been fully explored and determined by this court in Chief Judge Friendly's careful analysis in his opinion affirming De Sapio's conviction and the denial of his first motion for a new trial. A reading of that opinion, *United States* v. *De Sapio, supra,* is necessary if this one is to be fully comprehended.

Herbert Itkin has been a voluble but valuable informant whose information has resulted in the indictment, trial and conviction of some leading criminals. He has been cross-examined by experts. Appellant's counsel has culled the thousands of pages of his testimony and has assembled a melange of material, none of which on scrutiny has any meaningful relationship to the question of De Sapio's guilt or innocence. In essence, what is sought here is the grand inquisition and examination after trial of Itkin, urged upon us as an American Titus Oates. Itkin is not on trial here—whether he is Benedict Arnold, Nathan Hale or perhaps Walter Mitty or a composite of all three might well be a fascinating undertaking. However, we are circumscribed by well established rules of appellate review which limit our task to the determination of whether there is newly discovered evidence that Herbert Itkin committed perjury in the trial of Carmine De Sapio, that he was a government agent and not a true conspirator and that the government suppressed evidence in that trial.

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that De Sapio had conspired with others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity, to withhold permits sought by Consolidated Edison Company of New York, Inc. until it had awarded construction contracts to another conspirator. De Sapio was sentenced to concurrent terms of two years imprisonment on each count and to fines of $1500 on each of the three counts. De Sapio's first motion for a new trial based upon newly discovered evidence was denied by Judge Tyler on February 10, 1970. On November 16, 1970 this court affirmed the judgment of conviction and the order denying the motion for a new trial. *United States* v. *De Sapio,* 435 F.2d 272 (2d Cir. 1970). Petitions for rehearing and rehearing *en banc* were denied on December 28, 1970. The Supreme Court denied certiorari on May 24, 1971, 402 U.S. 999 (1971).

The motion made below is based upon alleged newly discovered evidence that Herbert Itkin, a principal government witness in the De Sapio trial, is a self-confessed perjurer and suborner of perjury, that he is further an agent of the C.I.A. and the F.B.I. and hence not a true conspirator and finally that the government knew of his perjury, indeed abetted it, and then suppressed it at trial in violation of the appellant's constitutional rights under the fifth and sixth amendments of the Constitution. The newly discovered evidence consists primarily of the alleged perjurer's sworn testimony in federal, state and English proceedings which were conducted after or were available for examination after the appellant's trial and appeal. After oral argument and the submission of briefs, Judge Tyler rejected all of these contentions in his order and opinion of December 13, 1971. After a careful reading of the testimony and cross-examination of Itkin in this case and his subsequent testimony in other cases, we affirm the order denying

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I

The Newly Discovered Evidence

1) In April, 1970 Itkin was a government witness in a case, *United States* v. *McCarthy,* No. 68 Cr. 467 (S.D.N.Y. April, 1970) which involved labor racketeering and had nothing to do with the factual issues in the De Sapio case. On cross-examination, in an attack on Itkin's credibility, he admitted that he had been indicted in New York County for conspiracy to commit perjury. Defense counsel then made an offer of proof that two detectives from District Attorney Hogan's office in New York County had overheard a conversation between Itkin and Marcus in a restaurant in December, 1967 in which Itkin allegedly advised Marcus, who was about to go before a New York Grand Jury, to falsify his testimony as to the source of the money Marcus had used to pay certain debts. The offer of proof was rejected by Judge Tyler, who presided at that trial, without objection by defense counsel. Itkin's questioning was limited to the fact of his indictment. There is no claim by appellant of any suppression by the government of Itkin's alleged subornation.

2) In October, 1965 Itkin entered into an "agreement and declaration of trust" for the benefit of creditors. In it he declared and swore that the list was a true and accurate description of his creditors and the amounts owed to each. In trials subsequent to De Sapio's, *United States* v. *McCarthy, supra,* and *United States* v. *Lipkins,* No. 71 Cr. 829 (S.D.N.Y. Aug., 1971), Itkin admitted on cross-examination that only a fraction of these were true debts, that the trustee, Mario Brod, was his C.I.A. superior and that he prepared the list with Brod's assistance.

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3) In 1964 and 1965 Itkin testified as a witness in federal bankruptcy proceedings concerning a certain Sire Plan which involved widespread Teamster Union corruption. In testimony subsequent to the De Sapio case (*United States* v. *Lipkins, supra; United States* v. *Amato,* No. 69 Cr. 569 (S.D.N.Y. Oct., 1970) and *United States* v. *Zulferino,* No. 68 Cr. 546 (S.D.N.Y. Jan., 1971)) Itkin admitted that he had lied in those proceedings to protect his cover and further that he had so advised the F.B.I.

4) From 1965 until March, 1971 Mrs. Itkin, Herbert Itkin's second wife, was engaged in acrimonious litigation with her first husband who was seeking the custody of her two children by that marriage. In 1965 Mrs. Itkin took her two children to England in violation of an order of the Westchester County Court. She was persuaded to do this by Itkin who claimed that his government assignment required that he infiltrate organized crime in England. Since she was English, her residence there with her children, would provide him with a plausible excuse or cover for his presence abroad. Itkin admitted in testimony before a New York State Court, *New York ex rel. Itkin* v. *Hirsch*, Civ. No. 4590 (N.Y. Sup. Ct., Westchester County Nov., 1970) that he had lied in both English and American courts as to the reason for his presence in England. Itkin's explanation for these lies was that he thought his government contacts would explain to both the English and American courts that he was doing this to protect his cover.

II

The generally accepted criteria for granting a new trial on the ground of newly discovered evidence are (1) the evidence must have been discovered since the trial, (2) it

must be material to the factual issues at the trial and not merely cumulative of evidence already introduced or impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). In dealing with appellant's motion insofar as it is based upon newly discovered evidence of Itkin's perjury in other proceedings, Judge Tyler found it "so lacking in merit as to be disposed of without extended discussion." He found that the evidence was a mosaic of new twists, bits and scraps of new details of subjects either raised at trial or muted at trial for tactical reasons or excluded by the judge in evidentiary rulings on cross-examination. We again stress that the role of a reviewing court on an appeal from the denial of a motion for a new trial is a limited one. "Factual determinations made by the trial court in passing on a motion for a new trial based on newly discovered evidence may not be set aside unless the findings are 'wholly unsupported by evidence.' *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946)." *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). Though our powers are so limited we have no difficulty in holding that the findings below are amply supported by evidence.

A. Itkin, The Perjurer

1. The fact that Itkin had been indicted for conspiracy to commit perjury by a New York County Grand Jury was of course known to Maurice Edelbaum, De Sapio's trial counsel. On cross-examination he asked the question and received an admission from Itkin that he had been so indicted. He further questioned Itkin about a petition to

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remove the indictment to the United States District Court on the ground that Itkin had been an informant for the F.B.I. He was in possession of the affidavit of Itkin's attorney seeking this removal. He was not permitted to ask Itkin if he was guilty of the crime and no objection was raised to this on appeal.

The only thing newly discovered here is the offer of proof of Itkin's subornation of Marcus' perjury, which evidence had been deemed inadmissible in the *McCarthy* case, *supra*. This extrinsic evidence of prior misconduct by Itkin would also be inadmissible to impeach his general credibilty in any retrial of De Sapio.[1] Even if true and admissible, Judge Tyler found that "it is totally absurd to conclude that this is a crucial item, particularly given Itkin's testimony and that of Marcus at this trial." Since Judge Tyler was the trial judge in both the *De Sapio* and *McCarthy* cases, his appraisal of the evidence proferred, commands

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[1] *United States* v. *Glasser*, 443 F.2d 994, 1002-03 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). See Proposed Fed. R. of Evidence 608, 51 F.R.D. 315, 389 (rev. draft 1971).

Appellant argues that this evidence would be admissible "'to reveal the [witness'] capacity, habit, plan, knowledge, intent [and], motive with respect to' his testimony. *United States* v. *Frascone*, 299 F.2d 824, 828-29 (2d Cir. 1962)." (Reply Brief for Appellant at 9). However, this paraphrase distorts the passage as well as the applicable rule. The *Frascone* case held that testimony about a *defendant's* prior criminal activity is admissible "to reveal the *defendant's* capacity, habit, plan, knowledge, intent, motive, or identity *with respect to the crime of which he is charged in the case on trial.*" *Id.* (Emphasis added). This argument is illustrative of appellant's continuing confusion as the identity of the defendant in this case. Further, Itkin's alleged subornation of Marcus' perjury two years before the De Sapio trial is no proof that he was prejudiced against De Sapio in this case so as to render the extrinsic evidence admissible under *United States* v. *Haggett*, 438 F.2d 396, 399 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971).

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respect. *United States* v. *Johnson*, 327 U.S. 106, 112 (1946); *United States* v. *On Lee*, 201 F.2d 722, 723 (2d Cir. 1952), *cert. denied*, 345 U.S. 936 (1953).

2. We are not impressed with the claim that Itkin's post-De Sapio testimony concerning the execution of the 1965 declaration and agreement of trust, adds new evidence which would lead to a different verdict in the De Sapio case. Aside from the obvious observation that it has nothing whatsoever to do with the guilt or innocence of De Sapio or with perjury by Itkin in the De Sapio trial,[2] it is an uncontested fact that Itkin was cross-examined about it by Edelbaum and twice admitted that he didn't owe the more than $400,000 in debts listed in the document which he had attested to be true. The jury had this admission of prior perjury before it, and when Itkin offered an explanation, Edelbaum responded "No, I don't want an explanation." A reading of the testimony of Itkin in the post-De Sapio cases *McCarthy*, *Lipkins* and *New York ex rel. Itkin*, *supra*, where he was given the opportunity to explain his concededly false affidavit, reveals that he would have undoubtedly testified that about 10% of the creditors were honest and the rest were hoodlums, loansharks and illegal kickback claimants whose claims Itkin personally rejected but whose exposure would jeopardize his cover as a government in

[2] Appellant cannot reasonably rely upon *Napue* v. *Illinois*, 360 U.S 264 (1959) and *Mesarosh* v. *United States*, 352 U.S. 1 (1956). In those cases the government either knew or suspected that one of its principal witnesses had *committed perjury in the case on trial*. Itkin's perjuries in other proceedings were designed to protect his cover. As such they establish no basis from which it may be inferred that Itkin perjured himself in this case. Significantly, appellant cites no instance of actual or suspected perjury by Itkin after he surfaced in 1968 and assumed the role of a prosecution witness.

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formant and gangland infiltrator. How this would have helped the De Sapio defense is indeed difficult to comprehend.

3. Itkin's admitted perjury in the 1964 and 1965 Sire Plan proceedings was not disclosed to the De Sapio jury, but once again as newly discovered evidence, it falls far short of the criteria established in *Polisi, supra*, as justification for a new trial. It is not at all material to the factual issues in the De Sapio trial, and again is merely impeaching. Further, there is ample support for Judge Tyler's finding that it isn't even newly discovered. Edelbaum knew of and in fact questioned Itkin about his participation in the Sire Plan, which was linked with corruption of Teamster Union officials who dispensed mortgage loans for payoffs; the recipients of the loans acted through intermediaries like Itkin, who in turn took kickbacks. These crude shenanigans ultimately resulted in indictments and a pre-De Sapio trial in the Southern District (*United States v. De Feo, et al.*, No. 68 Cr. 434 (S.D.N.Y. 1968) in which Edelbaum represented one of the defendants, the late James Plumeri. In the present case, Edelbaum elicited from Itkin on cross-examination the admission that he had made payoffs to teamster officials and that he had received a kickback. He did not explore the question of Itkin's perjury in the 1964 and 1965 proceedings, the transcripts of which had long been a matter of public record. However, his reticence may well have been motivated not by his lack of knowledge of Itkin's perjury, but rather because of Itkin's predictable excuse, which he later gave in *Lipkins, supra*,—that he did lie in the Sire Plan proceedings when he failed to implicate hoodlums and teamster officials in these corrupt practices since it would expose his cover. This answer could well have provoked jury sympathy for Itkin rather than having the effect of discrediting his verac-

ity. To suggest that the admission of such evidence would change the jury verdict in the De Sapio case we find to be beyond rational expectation.

4. The final claim of newly discovered evidence of perjury is that Itkin lied or suborned his wife's perjury in the American and English custody proceedings. While this is newly discovered, it is clearly collateral and not material. Once again Itkin's explanation for his part in the struggle his wife was making to keep custody of her children, would have no effect on the outcome of the De Sapio trial except perhaps to evoke sympathy for Itkin.

In sum, looking at all the alleged newly discovered evidence, we find nothing that is material, very little that is new, and that which is new is purely impeaching and therefore not a basis for granting the motion for a new trial. *United States* v. *Curry*, 358 F.2d 904, 919 (2d Cir.), *cert. denied*, 385 U.S. 873 (1966). Itkin after all had been cross-examined for almost five days by experienced professional trial counsel. He admitted to indictment for conspiracy to commit perjury, bribery and grand larceny; he admitted to failure to file income tax returns for two years; he admitted to lies, to kickbacks and payoffs, to the issuance of about 100 bad checks and to perjuring himself in a matter involving a payoff to one Braverman. The jury obviously believed that Itkin was telling the truth with respect to his dealings with De Sapio in the "high line" venture which led to the indictment. They further had the evidence of two Con Edison officials, as well as the opportunity to hear and observe the defendant, De Sapio, on the stand. Finally, there is not a shred of evidence in the matters we have reviewed to suggest that Itkin perjured himself in the De Sapio case.

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B. Itkin, The Government Agent

The second string on appellant's somewhat splintered bow is that Itkin's post-De Sapio testimony in other cases, establishes that he was not a true conspirator with De Sapio but was in fact an agent for both the F.B.I. and the C.I.A. The relationship between the F.B.I. and Itkin in the "high line" venture was carefully reviewed by Chief Judge Friendly in the first appeal, *United States* v. *De Sapio, supra*, 435 F.2d at 282-83. William Vericker, Coordinator of the Criminal Informant's Program for the New York office of the F.B.I., was in fact called by the defense as a witness in the trial. Based upon his and other evidence Judge Friendly affirmed the jury's finding that Itkin was acting on his own in the "high line" venture, that he was a true conspirator and only reported to the F.B.I. subsequent to the termination of the conspiracy. A careful reading of the evidence now relied upon by appellant does not contradict, but in fact, supports this position. The only subsequent proceeding in which Itkin was questioned as to his relationship with the F.B.I. in the De Sapio case was an English civil defamation case before Mr. Justice Lawton and a jury in the High Court of Justice, Queens Bench Division in July, 1971 (*Phonographic Equipment Co. Ltd.* v. *Associated Newspapers Ltd.*). In that case, Itkin repeatedly testified that the F.B.I. had not directed him to target any particular defendant but that he had acted on his own. (Transcript, July 8, 1971, at 12, 16-22). He testified that he had made $4000 in the De Sapio deal, which he had shown to the F.B.I. to be photographed and that he had shown them the money wrappers which were used as evidence in the trial. (*Id.* at 29-30; se 435 F.2d at 281 n. 10). All of this confirms and conforms with the facts found by the jury and affirmed by this court.

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It is now urged that subsequent testimony reveals that Itkin was a C.I.A. agent.[3] Piecing scraps of his testimony in various cases together, appellant casts Itkin in the role of a full-time, card-carrying, time-clock-punching employee of the C.I.A. soon to be pensioned off. While Itkin has undoubtedly testified to some melodramatic episodes, there is nothing at all to indicate that the C.I.A., which is charged with national security, had the slightest interest in the corruption of the Commissioner of the New York City Department of Water Supply, Gas and Electricity. That the C.I.A. did have an interest was "a leap" Judge Tyler refused to take in denying this motion.[4] We see no reason to disturb that finding.

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[3] As Judge Tyler points out in his opinion below, a sealed file in the custody of Judge Cooper of the Southern District of New York, contains an affidavit of the General Counsel of C.I.A. He certified to the court that prior to 1964 and "from time to time in successive years" Itkin had furnished information to the C.I.A. through an intermediary. The information he divulged was deemed classified by the C.I.A. under Executive Order 10501, 3 C.F.R. 1949-1953 Comp. at 979, 50 U.S.C. § 401 (1970). Itkin has further been instructed not to disclose information given to the C.I.A. under pain of prosecution pursuant to 18 U.S.C. § 793. As a side bar discussion in the De Sapio trial, Edelbaum stated that he had information that Brod, the trustee of Itkin's deed of trust, was Itkin's C.I.A. superior and that the entire agreement which was sworn to, was a complete fraud on creditors. While references to the C.I.A. were not permitted in the De Sapio trial, defense counsel referred to "another agency," and in his summation to the jury, he referred to Itkin's claim that he worked for the C.I.A.

[4] It is interesting to note that in *United States* v. *Russo*, 442 F.2d 498, 503 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310 (U.S. Jan. 11, 1972) this court held it to be harmless error for the trial court to reject testimony sought to be introduced by counsel for the defendant therein to the effect that Mario Brod, described as Itkin's contact with the C.I.A., would testify that Itkin's reputation for truthfulness was bad and that Brod would not believe him under oath. This court held that the jury was made fully aware of the negative aspects of Itkin's character and this additional testi-

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III

The Suppression of Evidence

Since Itkin did report his perjury in the 1964 and 1965 bankruptcy reorganization proceedings to the F.B.I. and since the C.I.A. was presumably aware of the falsity of the 1965 "agreement and declaration of trust," it is now urged that the government suppressed this evidence on the De Sapio trial. Judge Tyler found no suppression of evidence, and his finding is supported in the record. We have already pointed out that this evidence is certainly not material either to De Sapio's guilt or Itkin's perjury in the De Sapio case. Neither does it cast any light on his relationship to any government agency in the De Sapio-Marcus dealing. In any event, not only did trial counsel know of Itkin's participation in teamster corruption but, as we have pointed out (footnote 3, *supra*), he was aware that the trustee of the agreement and declaration of trust was Mario Brod, Itkin's reputed superior in the C.I.A.

We are left with the claim that the C.I.A. knew that the reason for Itkin's wife's presence in England was to establish his cover for infiltration and insinuation into organized crime in England. Since Itkin could not reveal this, the argument runs, the C.I.A. must have been aware of and in fact abetted his and his wife's perjury in the custody case where other reasons were given for their presence in England. If we accept this testimony of Itkin as a fact, there is no reason to discredit his further testimony that his wife and he believed that the "government" would make known to the English and American courts this fact of his testimony. We are not at all persuaded by

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mony could not have added more gild to the lily. The litany of Itkin's sins recounted in that opinion as having been already related to the jury, cannot at all compare in quantity or quality to those uncovered in Edelbaum's cross-examination of Itkin in the De Sapio trial.

a reading of the testimony that the C.I.A. ever advised Itkin or his wife to commit perjury in the custody case. Assuming, however, that the C.I.A. was aware of his perjury and his subornation of his wife's perjury, it is clear that the prosecutorial misconduct alleged here does not rise to the level which would warrant a new trial under the standards of *United States* v. *Polisi, supra,* 416 F.2d at 577-79; see *United States* v. *Keogh,* 440 F.2d 737, 741 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971); *United States* v. *Bonnano,* 430 F.2d 1060, 1063 (2d Cir.), *cert. denied,* 400 U.S. 964 (1970). There is no evidence that the government deliberately suppressed any material evidence or refused to honor a request to turn over evidence. On the contrary, massive amounts of Jenck's Act material (18 U.S.C. § 3500) was provided defense counsel. The peripheral impeaching evidence gleaned from collateral cases was simply not material to De Sapio's guilt, and the government's failure to disclose it to appellant could not have prejudiced him in any way. *United States* v. *Polisi, supra,* 416 F.2d at 577. Had it been made available in the De Sapio trial it would have cast Itkin in the role not only of a valorous government informant but a dedicated husband by the side of a distraught mother fighting for the custody of her children.

After carefully reviewing all of the arguments raised by counsel and all of the testimony upon which they are based, we affirm the order below denying Carmine De Sapio a new trial.

The alternative relief sought by appellant is an evidentiary hearing which presumably will provide the opportunity to once again cross-examine Itkin as to his relationship with the government and thus hopefully provide the new evidence which has been so clearly lacking here. We see no reason to provide this relief and no precedent for it. In our view the time for finality has come.

Affirmed.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

CARMINE G. DE SAPIO,

Defendant.

TYLER, *D.J.*

On December 6, 1971, defendant's second motion for a new trial was argued to this court.

In essence, defendant contends that "newly discovered evidence" has arisen from the records of certain criminal trials conducted in this court after the verdict in this case on December 13, 1969, in which Herbert Itkin was a witness. It is said that this evidence impeaches Itkin's credibility. A similar claim is made in respect to civil proceedings in a Westchester County court and before the Queens Bench Division of the High Court in England. Second, it is argued that post verdict proceedings, substantially those described above, have revealed that Itkin was an employee or agent of the Central Intelligence Agency ("CIA"), the detailed facts of which relationship are said not to have been known to defendant's trial counsel during this case. Third, it is urged that there is a substantial probability that the government, acting through the CIA, encouraged, if not masterminded, Itkin's lies, deals, cheats and criminal schemes, including the "high line venture" involved in this case while paying Itkin and affording him special tax relief and other perquisites in the bargain.

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The first branch of the motion is so lacking in merit as to be disposed of without extended discussion. Whatever test is used to evaluate a motion for a new trial on the grounds of newly discovered evidence, see the decision of the Court of Appeals in this case at 435 F.2d 272, at page 286 (2d Cir., 1970), American courts, so far as I can determine, have never granted a new trial solely because imaginative counsel, armed with further impeaching material acquired post-trial, suggests that a new jury might be persuaded thereby to render a verdict of acquittal, except, perhaps, in cases where prosecutorial misconduct has engendered false evidence or, possibly, the deliberate withholding of relevant evidence. *Ibid.*, at page 286, f.n. 14.

Defendant's new counsel on this motion fall far short of the mark of showing that the alleged "newly discovered" evidence was suppressed by the prosecution; indeed, it is a matter of record that most, if not all, of the evidence relied upon to support the first contention was not only known to the defense at trial but used by defense counsel for cross-examination of Mr. Itkin. Trial counsel cross-examined Itkin for substantially five days in which he skillfully and emphatically elicited admissions of lies, cheats, criminal schemes, tax evasions, and other shabby conduct. Two items clearly known to and either used or attempted to be used by trial counsel are said now to be the subjects of additional evidence; (1) the Marcus-Itkin perjury indictment in the Supreme Court of New York, New York County, and (2) the agreement for the benefit of creditors prepared by or for Mr. Itkin but never effectuated. See cross-examination by movant's counsel on November 19 and 20, 1969. As to the first, the claim is that an offer of proof by defense counsel at the trial before the undersigned of *United States* v. *McCarthy, et al.* in 1970 indicates that at a meeting between Itkin and Marcus at the Garden Cafe,

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Itkin coached Marcus to lie the next day before a grand jury. Whether true or not, it is totally absurd to conclude that this is a crucial item, particularly given Itkin's testimony and that of Marcus at this trial. As to the second matter, not only did trial counsel know about the "trust agreement" but he also knew that it was prepared with the help of one of Itkin's CIA contacts; furthermore, I find it difficult to assume now as then that he did not believe that the document may have contained false statements—otherwise, it scarcely can be understood why he wished to delve into the matter.

Less clear, possibly, is another claimed newly discovered matter, the transcript of Itkin's allegedly perjurious testimony in the reorganization proceeding in this court, *In re The Sire Plan etc.*, in 1964 and 1965. Surely, counsel knew of this testimony; he asked Itkin one or two questions about it. See, e.g. SM 1126. The claim now is that counsel had no knowledge of Itkin's false statements therein. The nature and substance of counsel's few questions at trial, in my view, squarely refute such a claim. Moreover, because of the underlying nature of Itkin's involvement in Sire Plan, any tactical reasons of counsel to explore this in depth, to put it kindly, were and are highly debatable.

The final "newly discovered perjury" of Mr. Itkin devolves from custody litigation commenced in Westchester County in the mid-sixties and relating to the children of Itkin's second wife by her first marriage to one Hirsh. It is beyond cavil that defense counsel knew about this litigation during this trial. See, e.g. DeSapio Ex. C id. Nevertheless, I will assume that he did not know all the details of the case and Itkin's affidavits and testimony therein, if only because the opinion of the court (Trainor, *J.*) apparently was not published until March, 1971. In summary, this opinion and Itkin's testimony are said to reveal that Itkin and his second wife took the children to England and kept them there in violation of the New York court's con-

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trary interlocutory order or orders, that an English court finally directed the Itkins to return the children to Hirsh in this country and that, perhaps most importantly, Itkin filed various affidavits and gave testimony in the English and Westchester County courts which was knowingly false, to the knowledge and with the complicity of the CIA, in order to furnish Itkin "cover" for his CIA assignment in the United Kingdom. Assuming *arguendo* that these are the facts, it is difficult to understand why counsel, to a certainty, would wish to expose to a jury Itkin's CIA "cover" or, if he did, that the jury would treat all of this as a fraud on the English [1] courts sufficient to impel them to acquit the defendant. Accepting, in other words, that there was governmental misconduct by virtue of CIA complicity in all this,[2] I find it difficult to conclude even that the jury "might" reach a different verdict. See *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir., 1928); see related discussion *infra*. Absent assumption of CIA misconduct, I have no difficulty, given the lengthy cross-examination dwelling on Itkin's other pecadillos at trial, in concluding that this evidence by no means "would probably produce a different verdict, if a new trial were granted." See *Berry* v. *State*, 10 Ga. 511, 527 (1851).

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[1] Contrary to what I understand movant to assert, my reading of Itkin's testimony and Judge Trainor's opinion fail to indicate that Itkin lied to or committed a fraud directly upon the Westchester court. As I read Itkin's testimony, which is cluttered with many interruptions of counsel and the court, he appears to have told the court of his CIA "cover", why he took his second wife to England, etc.

[2] For my part, I cannot be certain from all that I have read that the CIA specifically directed or encouraged Itkin to tell lies to the English court.

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In sum, dealing with movant's first contention, I view it as a clever mosaic of new twists, with concededly bits and scraps of "new details," to subjects either brought up at trial, or muted at trial for tactical reasons, or excluded by the judge in evidentiary rulings during cross-examination. If in hindsight the judge made incorrect rulings, or if trial counsel made mistakes in judgment, these are not proper building blocks for a new trial.

The second and third contentions of defendant also center upon the claimed role of Itkin as an employee of the CIA. Initially, there is the question of whether or not the defendant is right in contending that the prosecution or the court suppressed evidence of Mr. Itkin's relationship with the CIA. Despite the somewhat equivocal affidavits of present counsel and trial counsel, I know that the latter would not deny that the trial notes of the undersigned and the record clearly indicate that all of the participants in this trial were aware that Mr. Itkin had acted as an agent or informant or employee for the CIA for a period of time beginning at least as far back in 1963 or 1964. On November 19, 1969, this court expressly refused trial counsel's specific application for an evidentiary hearing in respect to the CIA employment of Mr. Itkin.[3] Moreover, the Jencks Act (18 U.S.C. 3500) material turned over to the defense necessarily revealed to counsel that Itkin had been a CIA agent or informant and, at least in part through the offices of that agency, had been introduced to the FBI in March, 1963.

Turning to the second and presumably more serious facet of defendant's "CIA contentions", it developed at oral argument of the motion that the lawyers for defendant are

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[3] This ruling, so far as I can determine, was never appealed by movant, or, if it was appealed, was not mentioned or criticized by the reviewing court.

seeking a hearing, at least initially, to examine Itkin and a responsible official of the CIA to ascertain the detailed nature and scope of Itkin's employment by that agency. Counsel candidly admitted that they have no evidence whatsoever that the CIA had anything to do with Itkin's involvement in the scheme which is the subject of this indictment and trial. Indeed, there is no evidence to such effect; more than that, such evidence as there exists points to quite a different set of facts. Perhaps the most important and compelling evidence in this area came out in the trial during the testimony of Agent Vericker of the FBI. Called by counsel for the moving defendant, Vericker on December 3, 1969 testified that he first met Itkin through the auspices of another federal agency. This euphemism[4] certainly did not mystify astute defense counsel who already knew from the papers that this meant the CIA. More compelling, the thrust of Vericker's testimony suggested almost beyond cavil that Itkin was in the high line venture on his own and that the FBI and no other agency had the authority and interest in appraising what information Itkin might thereafter furnish in this and other domestic criminal endeavors in which Itkin thrust himself.

As this court promised to counsel at the conclusion of the argument, I examined once again the sealed file of documents relating to the removal action before Judge Cooper of this court on December 7, 1971. That file reveals that by affidavit verified in October, 1968, the general counsel of the CIA certified to this court and to the Supreme Court of New York, New York County, *inter alia*, that from prior to 1964 and "from time to time in successive years . . ." Herbert Itkin had furnished information to that agency through an intermediary. Such information

[4] Required by the court's exclusionary rulings of November 19.

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was deemed classified by the CIA under Executive Order 10501, 18 F.R. 7049, November 10, 1953, as amended. Further, according to the CIA affiant, Itkin has been instructed not to disclose information given to the CIA or the identity of the intermediary or intermediaries under pain of prosecution pursuant to Title 18, United States Code, Section 793.

What has already been said demolishes counsel's strident claims that it has only recently come to lights in the cases of *United States* v. *McCarthy, et al.*;[5] *United States* v. *Lipkins* (Before Bonsal, *J.* in 1971), and in the civil defamation case before Mr. Justice Lawton and a jury in the Queens Bench Division in July, 1971 that Itkin admitted or implied "employment" by the CIA. Even more significant, Itkin in those cases made perfectly clear when given an opportunity that the CIA had nothing to do with his involvement in such domestic criminal schemes as the high line venture (this case), the Jerome Park Reservoir affair (*United States* v. *Corallo, et al.*), etc.. By way of illustration, at page 20 of the transcript of Itkin's cross-examination before Mr. Justice Lawton handed up by defense counsel on this motion, the following appears:

> "Q. Mr. Itkin, you were in this case (*United States* v. *Corallo, et al.*) as a participant and not on assignment from the Government, weren't you? A. The Government never gave me an assignment in any specific thing. Each individual deal was my decision for my infiltration."

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[5] It may be instructive, given the movant's thesis that so much "newly discovered evidence" came out on cross-examination in *McCarthy*, that all defendants therein were convicted.

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Again, somewhat similarly, at page 18 of the same transcript:

> "Q. (By Mr. Justice Lawton). Then you were recruited with knowledge of the CIA for FBI work? A. The CIA asked me.
>
> Q. Asked you to help the FBI. You were asked, as I understand your evidence and it is for the jury whether they believe it, you were asked to infiltrate organized crime? A. Yes, sir.
>
> Q. The result is that you mustn't obviously have a pay check coming from the FBI? A. That's right, sir."

These answers are consistent with Itkin's testimony in this trial, with his earlier testimony before Judge Weinfeld in the Jerome Park Reservoir case, and so far as I can determine, in every case since the jury verdict in this case, most particularly in *McCarthy* where, as already noted, the writer was the trial judge. There is no evidence to the contrary. Thus, boiled down to its essentials, movant and counsel would have me assume that the CIA, obviously without direct jurisdiction in the domestic criminal field, and having introduced Itkin to responsible agents of the FBI in 1963, would nevertheless have paid and instructed Itkin to participate as its agent or employee in the high line venture and to implicate Mr. DeSapio and others in that scheme. This broad leap I refuse to take.

In fairness to moving counsel, however, their request for a hearing could be viewed in a different light—viz. a request to develop the full facts of Itkin's CIA "employment relationship", including pay, perquisites, etc., with the ultimate claim that a new jury be convened to hear the familiar argument that Itkin was not a conspirator but a directed plant, not just of the FBI but of the CIA as well. In view

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of the litigation of the essential issue here involved and what happened in this trial and in *United States* v. *Corallo*, in respect to that issue, the chances of a new jury (or a new judge) reaching a different result or conclusion are painfully thin.

Finally, it is worth emphasizing that this motion casts up no "newly discovered" evidence directly bearing on Itkin's testimony regarding defendant's involvement in the high line scheme. It scarcely need be added that the same is true with respect to the testimony of such important witnesses as Hadden, Ulrich and defendant himself, not to mention other evidence such as the tape recording in the New York County District Attorney's office, the currency bands, etc. In sum, the best to be said for the present motion is that it casts up bits and scraps of further cross-examination material which, along with hindsight of clever counsel, could be used to cross-examine Itkin differently and better two years later. Given the five days of hard but fair cross-examination by able counsel two years ago, I doubt that any better job could be done or a different result achieved today.

This court declines to hold another evidentiary hearing as prayed. Motion for a new trial and other relief denied in all respects.

It is so ordered.

Dated: December 13, 1971

s/ R. TYLER, JR.
U.S.D.J.

APPENDIX D

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in this company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

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(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics,

or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

Federal Rules of Criminal Procedure

Rule 33, NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.